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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-568

DAISY ALOMAR,

Petitioner,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS DWYER, SWEET, ZEITLER and SERRANO IN OPPOSITION

SUSAN S. ROBFOGEL *and*
JAMES M. HARTMAN
HARRIS, BEACH AND WILCOX,
Two State Street
Rochester, New York 14614
(716) 232-4440
Attorneys for Respondents Dwyer, Sweet, Zeitler and Serrano

Daily Record Corporation
Rochester, New York
(10052)

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BRIEF FOR RESPONDENTS DWYER, SWEET, ZEITLER and SERRANO IN OPPOSITION

QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a municipal employer from dismissing from employment a provisional employee because of her refusal to change her political party enrollment?

ARGUMENT

I

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with any applicable decisions of this Court.

Petitioner argues that three recent decisions of this Court hold that the right of association is protected by the First Amendment. In fact, each of the cases cited deals with issues quite different from those raised by this case. *Moore v. Ogilvie,* 394 U.S. 814 (1969) (incorrectly cited by petitioner as *"Monroe" v. Ogilvie*) held that the State of Illinois could not require an equal number of signatures on a petition for nomination of a presidential elector from a sparsely populated county as was required from a populous county. The issue cited by the Court was the one man - one vote rule enunciated originally in *Baker v. Carr,* 369 U.S. 186 (1962).

Similarly *Williams v. Rhodes,* 393 U.S. 23 (1968) also dealt with discriminatory election procedures. In that case the Court struck down an Ohio requirement that any new political party must obtain petitions signed by 15% of the number of ballots cast in the last gubernatorial election whereas established parties were required to obtain the signatures of only 10% of the number of ballots so cast.

Finally, *Bates v. Little Rock,* 361 U.S. 516 (1960) dealt with a local law which required various organizations to disclose their membership lists. The Court held the law unconstitutional since in the case of unpopular organizations, publication of the names of members would inhibit the freedom of individuals to join such groups.

As is apparent, none of these cases cited by petitioner deals with the question raised in this case: can a provisional municipal employee be terminated from her position because of her political affiliations? Neither *Moore* nor *Williams* nor *Bates* speak to that issue but *Bailey v. Richardson*, 182 F. 2d 46 (D.C. Cir. 1950) aff'd 341 U.S. 918 (1951) spoke directly to the question when this Court held therein that the only protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. "In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority." *Id.* at 58.

Thus, the issue of political dismissals has been resolved by this Court, but not in the manner suggested by petitioner. The decision of the Court of Appeals below is not in conflict with any applicable decisions of this Court; on the contrary, it relies upon and affirms the decision of this Court in *Bailey*, which decision has, to our knowledge, never been overruled or modified.

II

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with decisions on the same issue in other circuits.

Petitioner relies on three lines of cases to support her contention that the decision below is in conflict with decisions in other circuits. None of the decisions cited in petitioner's brief really deals with the issues involved here. One line of cases concerns the use of public employees in political campaigns, a second line of cases relates to procedural due process in the dismissal of teachers, and the third line of cases

speaks to the right to fire non-tenured employees for their exercise of constitutionally protected privileges.

On the first point, petitioner cites *Shakman v. Democratic Organization,* 435 F. 2d 267 (7th Cir. 1970) cert. den. and *White v. Snear,* 313 F. Supp. 1100 (E.D. Penn. 1970). *Shakman* held that it was unfair to the candidates of a party not presently in power to require municipal employees, as a condition of their employment, to work for the party in power. The *White* decision enjoined county officials from recording as present at their municipal jobs on election day those employees who were absent from their regular jobs in order to work on behalf of the candidates of the party in control. Neither of these cases reaches the question of whether a municipal government of one political party must keep on its payroll a provisional employee enrolled in an opposing party. Both of the cases cited upset abuses of the patronage system; neither of them condemns the system nor comes close to finding it unconstitutional. "Plaintiff does not attack the patronage system itself, . . . and he does not attack the right of county employees actively to support candidates of their choice. . . . What plaintiff does attack is the abuse of the patronage system whereby the weight of state power (here municipal power) is brought to bear directly to effect the outcome of an election." *White, supra* at 1103.

The second line of cases cited in petitioner's brief deals exclusively with the procedural rights of teachers dismissed from their positions. The central issue of these decisions is whether a non-tenured teacher is entitled to be told why he is being dismissed or not rehired and whether he is then entitled to a hearing to air his position in rebuttal. *Drown v. Portsmouth School District,* 435 F. 2d 1182 (1st Cir. 1970), cert. den. and *Roth v. Board of Regents of State Colleges,* 310 F. Supp. 972 (W.D. Wisc. 1970) aff'd 446 F. 2d 806 (7th

Cir. 1971) both recognize a limited right to notice of the reason for dismissal and in *Roth*, the right to a hearing to rebut allegations made by the board of education.

Apparently contra to these decisions is the case of *Orr. v. Trinter*, 444 F. 2d 128 (6th Cir. 1971) in which the Court of Appeals for the Sixth Circuit held that a non-tenured teacher's interest in knowing reasons for non-renewal of contract and in confronting the school board on those reasons was not sufficient to outweigh the interest of the board in free and independent action with respect to the employment of probationary teachers.

These procedural questions are not, however, at issue in this case. Petitioner has at no point demanded a statement as to why she was dismissed nor asked for a hearing. In paragraph 12 of her complaint she merely states as a factual matter that she was fired without notice, charges or hearing. She has never claimed a right to these procedural devices, and she cannot at this late point demand this relief. Moreover, formal notice and hearing would serve no practical function in this instance since, for purposes of this motion, it is admitted that petitioner was dismissed because she refused to change her Democratic Party enrollment. The only question involved here is whether that was a permissible reason for dismissal.

A third line of cases relates to the right of a public employer to dismiss an employee without tenure because of his exercise of constitutionally protected privileges. Petitioner argues that a division exists among the circuits on the propriety of such dismissals, but, if any division does exist, it is over an issue quite different from the one posed by this case.

Five cases are cited by petitioner in which the courts found that a cause of action for dismissal had been stated. *Bomar v. Keyes*, 162 F. 2d 136 (2d Cir. 1947), cert. den. 332

U.S. 825 (1947) was concerned with the right of a female teacher to serve on a federal jury; *Johnson v. Branch,* 364 F. 2d 177 (4th Cir. 1966), cert. den. 385 U.S. 1003 (1967) involved a situation in which the court recognized that the plaintiff had been fired from her teaching position because of racial prejudice; in *McLaughlin v. Telindis,* 398 F. 2d 287 (7th Cir. 1968) the plaintiff teacher was fired because of union activity; *Birnbaum v. Trussell,* 371 F. 2d 672 (2nd Cir. 1966), the only case cited not involving the dismissal of a teacher, concerned, as in *Johnson v. Branch, supra,* dismissal on the grounds of racial prejudice. Finally, petitioner cites *Sindermann v. Perry,* 430 F. 2d 939 (5th Cir. 1970) cert. granted which again involves the dismissal of a teacher. In *Sindermann,* the Court of Appeals for the Fifth Circuit held only that summary judgment should not have been granted since the basic facts were still in dispute. "We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce." *Id.* at 943.

Petitioner then cites three additional dismissal cases in which courts found that no cause of action had been alleged arising out of the dismissals.

In *Parker v. Board of Education of Prince George's County, Maryland,* 348 F. 2d 464 (4th Cir. 1965), cert. den. 382 U.S. 1030 (1966), reh. den. 383 U.S. 939 (1966) plaintiff alleged that his teaching contract with the Board was terminated because he taught from a proscribed book, an alleged violation of his freedom of speech. The court refused to reach the constitutional question and held that its decision rested "entirely on the contract", *Id.* at 465, by the terms of which plaintiff was employed provisionally and without tenure.

Jones v. Hopper, 410 F. 2d 1323 (10th Cir. 1969), cert. den. 397 U.S. 991 (1970) like *Parker v. Board of Education of Prince George's County, Maryland, supra,* was an action wherein a teacher was denied reappointment allegedly because he had exercised his constitutional right of free speech. The court affirmed the dismissal of the complaint on the grounds that the employer board had not exceeded the authority granted to it by the applicable Colorado law in refusing to rehire the plaintiff.

Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F. 2d 1153 (8th Cir. 1969), cert. den. 396 U.S. 843 (1969) involved a somewhat different issue. There the court saw the dismissal as part of an internal dispute between plaintiff teachers and their principal. The decision in that case specifically noted that no racial issue was present, and that "stripped of the racial issue this case presents no federal question" and the complaint must be dismissed. *Id.* at 1157.

What evolves from an analysis of all of these cases is that a dispute may exist among the circuits over the propriety of dismissals involving deprivation of constitutionally protected rights. But that is not the question here before the Court. Here the issue is whether a provisional public employee has a constitutional right to work for a government administration of one political party while remaining an enrolled member of a competing political party. The rule of law that has evolved on this issue is clear — the courts in none of the circuits have recognized any such right and this Court has specifically held that no such right exists. *Bailey v. Richardson, supra.* Thus, any conflict that may exist among decisions in the circuits in cases involving constitutionally protected rights is irrelevant to this case and presents no basis for a petition for a writ of certiorari.

III

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with any applicable state laws.

Pursuant to Article 3 of the Charter of the City of Rochester (P. 22)*, the City Manager has the power to appoint and discharge employees of the Bureau of Community Relations. §3-3 of the Charter states very clearly that the City Manager

> . . . shall have the power and it shall be his duty . . . to appoint and remove the heads of all departments, the members of all boards, and all subordinate officers and employees, except as otherwise provided in this local law.

Daisy Alomar was a "subordinate employee" in the Bureau of Community Relations and thus subject to discharge by the City Manager.

The authority of the City Manager to terminate petitioner's employment is also set forth in Art. 13, §2 of the New York Constitution (P-15) which states that:

> When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

The City Manager was the "authority making the appointment" and as such he had the right and power to discharge petitioner from the City's employ.

Petitioner has not specified the existence of any contractual or statutory provision to protect her from the

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* Material in parentheses refers to Petitioner's Petition.

City Manager's right to summarily dismiss her. In paragraph 12 of the complaint (P-4a) petitioner alleges that she was fired "without notice, without informing her of any charges or cause, without any hearing and without justification." Yet petitioner fails to allege that she was entitled to notice or a hearing on charges, and in fact, petitioner would not be entitled to notice and a hearing on charges unless she was covered by the statutory protection of the Civil Service Law. Provisional employees as defined and characterized in §65 of the Civil Service Law (P-17) may be dismissed without notice or a hearing on charges.

It is well established law in New York that a provisional employee has no tenure of office, can be removed at will, and is not entitled to any review of his discharge under the Civil Service Law. Matter of *Riggi v. Blessing,* 9 AppDiv2d 423, 195 NYS2d 971 (3rd Dept. 1959), aff'd 10 NY 2d 917, 223 NYS 2d 871 (1962). In *Riggi* the plaintiff held a provisional appointment as Senior Clerk for the City of Schenectady. From the date of his provisional appointment to the date of his discharge, no competitive examination was held although the position was in the competitive class. Nontheless, the Court ruled that *Riggi* could be removed at will and was not entitled to any review of his discharge.

In the often cited case of *Benon v. LaGuardia,* 285 N.Y. 560 (1941) the petitioner was an honorably discharged veteran employed as a junior administrative assistant in the Department of Welfare of the City of New York. He was interrogated about certain charges of misconduct but later cleared of guilt. Nonetheless, he was permanently separated from his employment in the Department. In moving to dismiss the petition defendants submitted an

affidavit alleging that petitioner's status was that of a provisional appointee. The Court of Appeals held that "though after investigation by the Commissioner of Investigations, the petitioner was exonerated from any wrongdoing, we cannot review his dismissal because he had no right of tenure under the Civil Service Law". *Id.* at 561.

Among the long line of cases supporting the rule that provisional appointees are terminable at will is the case of *Schmidt v. Flynn*, 200 NYS2d 1009 (Sup. Ct., Suffolk Co., 1960). Petitioner *Schmidt* alleged that he had been discharged from his employment as water district superintendent "because of a change of political complexion of the Board." The Court held that petitioner "was subject to removal for any cause and the political one is in the traditional exercise of the democratic process which is restricted only by the Civil Service Law and the good judgment of the appointive power." *Id.* at 1012.

In *Merriweather v. Roberts*, 268 N.Y. 12 (1935) the New York Court of Appeals was confronted with the question of whether an employee of the City of Buffalo, in the non-competitive civil service class, could be discharged because of his political affiliations. The court held that he very definitely could be discharged at the will of the municipal employer.

> If every employee or appointee in the classified civil service whose position has been obtained without the requirement of passing a competitive examination were to be accorded upon dismissal the right to mandamus to review the action of the employing officer or board responsible for his discharge upon the sole ground here under consideration, either chaos would result through the flooding of the courts with mandamus proceedings or there would result an extension beyond the clear legislative intent of the tenure of office features of the civil service. *Id.* at 20.

Thus, the decision of the Court below was very much in accord with the applicable law in the State of New York.

Despite the considerable body of New York law which clearly holds that a provisional employee is entitled to no job protection against political dismissals, petitioner points to *Matter of Tischler v. Board of Education of the Monroe Woodbury Central School District No. 1*, 37 App Div 2d 261 (2nd Dept. 1971) and *Rindone v. Kern*, 282 N.Y. 214 (1940) as exceptions to that rule. In fact, neither of these cases is an exception, and neither of them even deal with dismissals for political cause. *Matter of Tischler* involved a probationary teacher allegedly denied tenure as a result of her union activity. The court refused to grant defendant's motion to dismiss for failure to state a cause of action, holding that the complaint alleged a claim under the New York public employee labor laws prohibiting job discrimination on the basis of union activity. In *Rindone* the petitioners were employees in the Department of Welfare who were appointed to their positions through a clerical error. The court there held that the petitioners should be permitted to retain their positions pending the outcome of a special civil service examination prepared to correct the error.

Nothing to which petitioner cites us in the law of New York would prohibit removal from office of a provisional employee for political reasons, and applicable State law presents no basis for the petition herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

SUSAN S. ROBFOGEL *and*
JAMES M. HARTMAN
HARRIS, BEACH AND WILCOX,
Two State Street
Rochester, New York 14614
(716) 232-4440
Attorneys for Respondents Dwyer, Sweet, Zeitler and Serrano